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In the
Supreme Court of the United States

OCTOBER TERM, 1970

No. 1506

BOSTON & PROVIDENCE
RAILROAD DEVELOPMENT GROUP,
PETITIONER,

v.

CHARLES W. BARTLETT, TRUSTEE, ET AL.,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Boston & Providence Railroad Development Group, petitioner, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding in December, 1970.

Opinion Below

The opinion of the Court of Appeals is reported at 435 F.2d 825.

Jurisdiction

The judgment of the Court of Appeals was originally entered on December 11, 1970. A timely petition for rehearing was decided December 21. The opinion of the Court, as amended, was entered on December 24. Its mandate went down on December 24.

Jurisdiction of this petition rests on 28 U.S.C. 1254(1).

Questions Presented

1. While the confirmation of a 1966 railroad reorganization plan under Section 77 was pending in a court of review, a petition was filed in 1970 under 11 U.S.C. Section 208(a)(1), asking the Interstate Commerce Commission to report whether changes, facts, or developments have occurred which make it necessary or expedient for the Commission to reexamine (and possibly revise) the plan in order to insure that, if consummated, it shall *then* be fair and equitable, feasible, and in the public interest, in the opinion

of the Commission (which holds primary responsibility for the plan).

Should not the plan proceedings be suspended until the Commission reports on that petition, as required by Section 208(a)(5)?

2. The plan requires sale of B&P's railroad at a price measured by 1963 scrap value. It then requires B&P to return more than half of the sale price back to the buyer under the pretence of paying old debentures that have not been proved and are believed to have no valid claim against B&P. The Commission's approval of this device was contingent on judicial approval of the claim on the debentures. Adjudication of the debentures has been blocked.

Would consummation amount to a forced taking of B&P's property at less than just compensation? Or without due process?

Constitution and Statute

Amendment V

> ... nor shall any person ... be deprived of ... property without due process of law; nor shall private property be taken for public use without just compensation.

11 U.S.C. Section 208(a)

> (a) Notwithstanding any other provision of law—
>
> (1) with respect to any plan of reorganization or modified plan of reorganization approved by the Interstate Commerce Commission under the provisions of section 77 of the Bankruptcy Act, as amended, subsequent to the effective date of this Act, it shall be the duty of the Commission, upon petition of any party to the proceeding filed at any time more than eighteen

months after certification by the Commission to the court of the plan or of an order disposing of a like petition, but before any order confirming the plan shall have been entered, or, such an order having been entered, if an appeal from said order is pending on said date in a circuit court of appeals or the matter is pending in the Supreme Court on a petition to review any order of a circuit court of appeals dealing with said order of confirmation ... to report to the court in which consideration of such plan is then pending, any changes, facts or developments which have occurred since the approval of such plan by the Commission, which were not provided for in the plan, and which in the opinion of the Commission make it necessary or expedient for the Commission to reexamine or reconsider and, if necessary, to revise such plan in order to insure that such plan, if consummated and put into effect, shall then, in the opinion of the Commission, be fair and equitable and in the public interest and compatible with the provisions of this section and section 77 of the Bankruptcy Act, as amended. Upon the filing of any such report by the Commission with the court, the court shall remand the plan to the Commission for such reexamination, reconsideration, and possible revision;

(5) each petition filed under the provisions of paragraph (1) ... of this subsection (a) shall be filed with the court before which is pending the plan which is the subject of the petition and such petition shall be referred by the court to the Commission. Upon the filing of such petition with the court all further proceedings for confirmation of the plan shall be suspended pending disposition of the petition by the Commission and certification of its action thereon to the court.

62 Stat. 162. (1948)

Statement of the Case

Section 77 of the Bankruptcy Act (11 U.S.C. 205) reformed the procedures of railroad receivership and reorganization in equity, chiefly by appointing the Interstate Commerce Commission to serve specially as an expert arm of the district court to design the plan of reorganization.

Fifteen years later, in 1948, to overcome the Commission's demonstrated reluctance to reopen plans of reorganization in light of changed conditions, Congress enacted 11 U.S.C. Section 208(a)(1) *requiring* the Commission, upon timely petition of a party, to report whether changed conditions make it necessary or expedient for the Commission to reexamine (and possibly revise) its plan so as to insure that, if consummated, the plan shall then, in the opinion of the Commission be fair and equitable, feasible, and in the public interest. (Equity speaks in the present.)

On March 11, 1966, the Commission, by its Seventh Supplemental Report, approved a plan of reorganization for the independent Boston & Providence Railroad Corporation (B&P), calling for sale of B&P's railroad to The New York, New Haven & Hartford Railroad Company (New Haven).

On September 16, 1968, the Commission adopted its Eighth Supplemental Report, whereby it negatively disposed of a petition under Section 208(a)(1) which sought revision of the B&P plan because of changed conditions.

On November 4, 1968, the District Court confirmed the plan.

At the end of 1968, New Haven withdrew from the railroad business, sold its own railroad to the Penn Central Transportation Company, and went into liquidation.

On appeal from confirmation of the B&P plan, the Court of Appeals refused to review its merits. No such review has ever been obtained.

While the confirmation was pending in the Supreme Court on a petition for a writ of certiorari (October Term 1969, No. 882) a new petition under Section 208(a)(1) was filed on March 18, 1970, asking the Commission to report that changes, facts, or developments have occurred since 1966 which make it necessary or expedient for the Commission to reexamine (and possibly revise) the plan, in order to insure that, if consummated, the plan shall then, in the opinion of the Commission, be fair and equitable, feasible, and in the public interest.

That Section 208 petition now lies before the Commission.

On June 21, 1970, Penn Central went into Section 77 administration as an insolvent debtor. Next morning the B&P reorganization court heard and approved a petition to proceed for consummation of the 1966 B&P plan, regardless. It refused to postpone further proceedings on the plan until the significance of the Penn Central crash could be understood.

The Court of Appeals affirmed. Adhering to the record, it regarded Penn Central's crash as making no difference. It did not regard the Section 208 petition as a factor.

On the constitutional issue. Petitioner argued before the Court of Appeals (on a special motion for relief) that a judicial command for sale of B&P's railroad to New Haven (or to Penn Central) in the guise of a Section 77 plan of reorganization amounts to a public taking. It requires a guaranty of just compensation to the owners. The Supreme Court's decision of June 29, 1970, in the New Haven Inclusion Cases was cited, along with the Hudson Tubes case, *infra*.

Petitioner showed that the 1966 B&P plan would force sale of B&P's property for only 42.5% of scrap value, a price that is clearly unconstitutional. For the third time, however, the Court of Appeals barred any review of the plan on its merits.

This question would presumably be dealt with by the Commission upon a reopening of the plan under Section 208.

Reasons for Granting the Writ

1. *Section 208 commands suspension of further proceedings on the plan until the Commission shall report on the pending Section 208 petition.* This is clear from the explicit words of Section 208(a)(5). Unless the plan proceedings are suspended, the relief of Section 208 is a hoax.

In October Term 1969, No. 882, this Court merely denied certiorari. The lower courts apparently accept that action as also destroying the Section 208 petition.

In the course of a recent procedural inquiry at the Commission, it was indicated that the Commission doubts its power to deal with the pending Section 208 petition on its merits—because of the Supreme Court's denial of certiorari in No. 882. (Of course conditions have changed dramatically).

2. *Consummation of the 1966 plan would be a judicial taking of B&P's railroad for the benefit of another railroad company without just compensation or due process.* The sale price was supported by a New Haven real estate man's 1964 estimate of B&P's salvage value, at $9,500,000. Hence they designed the plan thus:

(a) Payment in cash for the B&P public stock	$2,284,700
(b) Payment by cancellation of New Haven's B&P stock	$1,750,980
(c) Payment of new bonds	$4,991,000
(d) Total of above	$9,026,680

Some accounting legerdemain boosted it to $9,500,000, but this element was only window dressing lacking real value.

The plan requires B&P to kick back the $4,991,000 in new bonds, in order to "pay" $2,170,000 in old debentures with interest. But the old debentures were issued under the old B&P lease indenture which required New Haven to provide payment for B&P's benefit. When New Haven defaulted on that obligation, B&P was allowed a claim against New Haven. New Haven then satisfied B&P's claim by going out and paying off the holders of the matured debentures, which then became dead paper. New Haven audaciously pledged them as additional collateral (for whatever they might be worth), and thus they fell into the U.S. Treasury when New Haven defaulted on its borrowings.

The Commission approved the device of having B&P kick back the new bonds to New Haven in order to "pay" the old debentures only if the old debentures should be adjudicated valid. If the old debentures should be adjudicated invalid, then New Haven conceded that the new bonds should be distributed to B&P's stockholders. But without the new bonds, the net price for sale of B&P amounts to only 42.5% of salvage value. Adjudication is consistently blocked. Thus normal due process and just compensation are blocked.

On June 29, 1970, the Supreme Court said that such a price may not go below liquidation value (*New Haven Inclusion Cases*).

> The purchase price that the Commission and reorganization court have required Penn Central to pay to the New Haven estate is based upon the liquidation value of the seller's assets . . . In the circumstances of this case, . . . we agree with the [Connecticut] reorganization court that it would be unfair and inequitable to allow Penn Central to take the properties for any lesser sum.
>
> 90 Sup. Ct. 2054, 2108.

In the Hudson Tube case, even a full scrap value was rejected as unconstitutionally low for a railroad that is being taken over for use as a railroad, and not for scrapping. The New York Court of Appeals pointed out that the railroad property

> has a usefulness created by the owner himself through the expenditure of large sums of money and by the continued operation of the property for the very purpose for which the petitioner is acquiring the property ... The owner has developed its property at a cost of millions of dollars and operated it for more than 50 years. It is admittedly of great usefulness in the daily transportation of thousands of commuters. A condemnor should not be permitted to tell him: "It's only worth scrap or less."
>
> *Port Authority Trans-Hudson Corp.* v. *Hudson Rapid Tubes Corp.*, 20 N.Y. 2d 457, 231 N.E. 457.

Petitioner says that the old debentures are dead bonds. The Commission said in 1966 that if this is true the plan price is too low. The courts have withheld adjudication of the debentures and thus force B&P to pay them a second time and to reduce the net sale price to 42.5% of scrap value. This constitutional defect can be raised at any time.

Petitioner's Request

If the Supreme Court will now simply adjudicate that the Commission is *not* barred from passing on the merits of the pending Section 208 petition, then the plan can be reopened and straightened out in the Commission without bothering this Court on the merits.

This approach is consistent with the Chief Justice's publicized recent statement that the courts should be relieved

from having to pass on the merits of economic affairs, which should be turned over increasingly to expert commissions.

By acting now valuable time is saved.

Respectfully submitted,

ARMISTEAD B. ROOD
Attorney for Petitioner

March 22, 1971

APPENDIX

United States Court of Appeals
For the First Circuit

No. 7703.

IN THE MATTER OF
BOSTON & PROVIDENCE RAILROAD CORP.,
DEBTOR,
BOSTON & PROVIDENCE RAILROAD
DEVELOPMENT GROUP,
APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

December 24, 1970.

PER CURIAM. Appellant appeals two orders entered by the District Court for the District of Massachusetts. The first authorized the trustees and reorganization managers of the debtor, Boston & Providence Railroad, to petition the Interstate Commerce Commission for authority to consummate a Plan of Reorganization previously approved by the I.C.C. and the courts. Appellants objected that approval of the Plan would give the Penn-Central Railroad, which had just announced its bankruptcy, title to Boston & Providence property.

We have serious doubts as to our jurisdiction over this claim. Appellant makes no effort to address this issue. Its brief is primarily concerned with issues previously litgated, *In re Boston & Providence Railroad Corporation*, 413 F.2d

137 (1969), *cert. denied sub nom Boston & Providence Railroad Development Group* v. *Bartlett,* 90 S. Ct. 1103 (1970), *reh. denied,* 90 S. Ct. 1496, and we do not think it can raise them again, even in this guise of contesting a court order. *See* 11 U.S.C. § 208. Even if we have jurisdiction, we see no merit to appellant's claim. We do not perceive that the substitution of the insolvent Penn-Central for the insolvent New Haven will increase the incentive to dispose of Boston & Providence's property at less than a fair value. Moreover, under the Plan, the Penn-Central trustee is bound by his fiduciary duty to seek fair market value; an independent "charge trustee" has a duty to monitor sales and leasing activities of the Penn-Central trustee; and disputes between the two are subject to arbitration. These provisions constitute institutional safeguards against any action by Penn-Central (or its successor) which might jeopardize the interests of the holders of Boston & Providence securities. The district court found that Penn-Central's bankruptcy is not sufficient ground to reopen issues alread extensively litigated for 32 years at a time when prompt consummation of the Plan of Reorganization is essential. We see no reason to overrule this decision.

Appellant's second claim is that the court's final order approving a sale of certain real estate by the trustee in reorganization is an abuse of the district court's discretion. There is no merit to this claim. The trustee represented that an expert appraisal of the real estate had verified the price as fair. Appellant in reply says only that by waiting until Boston & Providence obtains title to certain adjacent real estate, the trustee might be able to sell all the real estate in one package for a greater sum, that this sum might exceed $500,000, and that a different procedure of approving the sale might then be called for. This argument substitutes conjecture for fact.

Appellants also offered at argument a compilation of mis-

cellaneous material ranging from testimony to newspaper clippings, which we deem irrelevant and therefore reject. They also submitted a "Motion for Relief from an Unconstitutional Taking" which, so far as we can understand it, is an appeal to our inherent equity power to deal with this matter in disregard of the statutory procedure. We deem the motion frivolous.

The reorganization managers of Boston & Providence have filed a motion for the assessment of costs attributable to the delay occasioned by this appeal and request that we reserve judgment until a future time when evidence can be marshalled and presented. We reserve judgment as to both liability and amount.

Affirmed.